

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAPHAEL FERGUSON,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2008

No. 274614  
Wayne Circuit Court  
LC No. 06-000233-01

Before: Gleicher, P.J., and O’Connell and Kelly, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree home invasion, MCL 750.110(a)(3). He was sentenced to 86 months to 15 years in prison. We affirm.

I. Basic Facts

The Detroit police received a report that a specific vehicle had been seen “casing homes,” and a plain clothes officer went to the area in an unmarked vehicle. The officer saw a vehicle matching the description given parked in front of the victims’ house with the trunk open and someone waiting in the driver’s seat. The officer entered the backyard, where he saw the backdoor open and three men emerge from the house carrying pillowcases. The three men fled, and defendant was apprehended. The home was ransacked, and a jacket, some DVDs, some unwrapped Christmas presents, a PlayStation®, and other items were missing. Consistent with his statement to the police, defendant testified that the cousin of one of the victims had let him into the house with a key and he was helping the cousin move.

II. Trial Court Judge’s Conduct

Defendant argues that the trial court judge’s intemperate attitude, belittling comments, and conduct toward defense counsel, and interruption of defense counsel’s examination of witnesses deprived defendant of a fair trial by an impartial judge and jury and of his right to present a defense and confront witnesses against him. We disagree. Because defendant failed to object on the same ground he raises on appeal, this issue is unpreserved, *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005), and we review it for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A review of the record shows that the trial court, at times sua sponte and at times in response to the prosecutor's objection, interrupted defense counsel's cross-examination of various witnesses and made evidentiary rulings that forestalled certain avenues of defense counsel's questioning. Defendant does not challenge the trial judge's evidentiary rulings but rather the manner in which they were made.

MRE 611 dictates that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Further, the trial court "has a duty to limit the introduction of evidence and the arguments of counsel to relevant and material matters." *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996); MCL 768.29. The trial court has broad discretion in fulfilling this duty, but its power is not unlimited. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986). "A defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court[.]" and belittling defense counsel to the extent that she is held up to contempt in the eyes of the jury destroys the impartiality necessary for a fair trial. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). Reversal is warranted when the judge's conduct or comments "pierce[] the veil of judicial impartiality," which occurs if the comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Burgess, supra* at 719; see also *Paquette, supra* at 340.

We review the record as a whole; "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant[.]" *Paquette, supra* at 340. In the instant case, the trial court judge expressed impatience and frustration throughout the trial and directed it toward both parties. The trial judge's evidentiary rulings and interruptions were not unduly interruptive and forestalled certain irrelevant avenues of defense counsel's cross-examination. Defense counsel was more often involved in contentious dialogue with the trial judge than the prosecutor because she persisted in pursuing avenues of examination the judge ruled inadmissible, and she did not readily accept the judge's rulings. Defendant testified and was provided a full opportunity to present evidence and a defense, and the trial judge did not interrupt his testimony. When defense counsel said "Judge, just briefly" to begin her redirect examination of defendant, the trial court admonished her to never say that again. Both parties had used that phrase during the trial, and the reprimand evidenced more the trial judge's general irritability than exclusive criticism of defense counsel. Further, this Court has recognized that partiality is not established by a trial court's expressions of "impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display." *People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999). Although the trial judge could have been more patient and diplomatic, defendant was provided an opportunity to present his direct evidence, and there was no evidence that the trial judge's conduct or comments caused the jury to perceive defense counsel, defendant, or his defense with contempt or destroyed the impartiality necessary to a fair trial. The trial judge's conduct and comments did not prejudice defendant's substantial rights to a fair trial by an impartial judge and jury, to present a defense, or to confront witnesses against him. Therefore, reversal is not warranted.

To the extent that defendant challenges the trial judge's closing remarks to the jury regarding defendant's guilt, these comments were made after the verdict was entered. Defendant has failed to show that these remarks constituted plain error affecting his substantial rights.

### III. Prosecutorial Misconduct

Defendant contends that he is entitled to a new trial because the prosecutor committed misconduct during his rebuttal argument. We agree that the prosecutor's conduct was improper, but a new trial is not warranted. Because defendant failed to object to the prosecutor's remarks, this issue has not been properly preserved for appellate review, *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), and will only be reviewed for plain error affecting his substantial rights, *Carines*, *supra* at 762-763; *Ackerman*, *supra* at 448.

During her closing argument, defense counsel stated that the prosecutor had attempted to mislead the jury into believing that defendant had ransacked the home and dropped the items he attempted to steal when he saw the police. Defense counsel noted that there were many valuables left in the home and the photographs taken at the home showed the stolen items all "neatly placed[,]" suggesting that they had been arranged by the police. During his rebuttal argument, the prosecutor discussed witness credibility and asked the jury whether they believed the victims or defendant's conspiracy theory. The prosecutor then stated, "I have no reason to lie," which is the remark defendant challenges on appeal. Defendant claims that this statement improperly encroached on the jury's role of evaluating credibility and improperly expressed personal belief in the defendant's guilt, thus depriving defendant of a fair trial.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham*, *supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Generally, a prosecutor is permitted to argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). However, "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276 (discussing the prosecutor's reference to a plea agreement, which contained a promise of truthfulness). Further, a prosecutor may not place the prestige of his office behind his witnesses. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). By using the pronoun "I" in saying "I have no reason to lie[,]" the prosecutor erred by personally aligning himself and his office with his witnesses and making their testimony his own, or in implying that he had special knowledge by virtue of his office to know which witnesses were telling the truth. This remark, which closely identified the prosecutor's witnesses with himself and his office, was plain error.

However, no error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*,

245 Mich App 572, 586; 629 NW2d 411 (2001). The trial court instructed the jury that the attorneys' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Further, the evidence showed that defendant was found leaving the victims' home with a pillowcase containing items from the home. Defendant fled, and he was apprehended by police. Therefore, the prejudicial effect of the prosecutor's remark would have been cured by the jury instructions, and the prosecutor's remark did not deny defendant a fair trial.

Defendant also claims that he was denied the effective assistance of counsel by his attorney's failure to object to the prosecutor's comment. Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*<sup>1</sup> hearing, defendant's allegation of ineffective assistance of counsel has not been preserved for appellate review, and this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Under this standard, defendant must show that, if defense counsel had objected to the prosecutor's remark, he would have been acquitted. As previously noted, defendant was not deprived of a fair trial by the prosecutor's comment. Therefore, defense counsel's failure to object to it had no prejudicial impact and did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ Peter D. O'Connell  
/s/ Kirsten Frank Kelly

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).